



Department: Attorney
Cost Center: 1501
For Agenda of: 7/16/2024
Placement: Consent
Estimated Time: N/A

FROM: Christine Dietrick, City Attorney
Prepared By: Sadie Symens, Deputy City Attorney

SUBJECT: APPROVE PARTICIPATION IN NATIONAL OPIOID LITIGATION SETTLEMENT AGREEMENT WITH KROGER CO.

RECOMMENDATION

1. Approve City participation in the nationally negotiated opioid related settlement agreements with supermarket pharmacy Kroger Co. ("Kroger"); and
2. Authorize the City Manager and City Attorney to execute documents as needed to participate in the settlement agreement; and
3. Authorize the City Manager and City Attorney to elect disposition of Kroger settlement funds (deferral of settlement funds to the County or direct allocation to the City); and
4. Direct the City Manager and City Attorney to conduct an evaluation of the aggregate national opioid litigation settlement amounts and administrative burdens of direct allocation, and, if warranted, authorize the City Manager to change the distribution election for all settlements, with notification the Council.

POLICY CONTEXT

Participating in the settlement agreement will provide substantial funding to be used to address opioid abuse, addiction and other opioid related issues and may assist the City in advancing City objectives consistent with the City's Economic Recovery, Resiliency and Fiscal Sustainability, Diversity, Equity and Inclusion and Housing and Homelessness Major City Goals.

DISCUSSION

Background

A new proposed nationwide settlement agreement¹ ("Settlement") has been reached that would resolve prescription opiate litigation that has been brought by numerous states, local political subdivisions, and special districts against Kroger Co. supermarket pharmacy ("Kroger") over the impacts of opioid use, abuse, and addiction. The Settlement also contains injunctive relief governing opioid dispensing practices and requires Kroger Co. to implement safeguards to prevent diversion of prescription opioids.

¹ View the proposed Kroger Settlement Agreement here: <https://nationalopioidsettlement.com/wp-content/uploads/2024/05/Kroger-Multistate-Settlement-Agreement-Circulated-to-States-March-25-2024.pdf>

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The proposed settlement requires Kroger to pay approximately \$1.2 billion to participating states and subdivisions to remediate and abate the impacts of the opioid crisis. The settlement requires payments over 11 years after its effective date. Depending on participation levels, California may receive up to \$122 million in opioid abatement funds, 85% of which will go directly to cities and counties.

The proposed settlement has two key participation steps. First, each state must decide whether to participate. California has elected to participate in the settlement. Second, eligible subdivisions within the state must decide whether to participate in the settlement agreement and affirmatively opt-in by no later than August 12, 2024. Based upon subdivision participation forms received on or before that date, the subdivision participation rate will be used to determine whether a state earns its maximum potential payment under the settlement. If the settlement moves forward, the subdivision's release will become effective. If a settlement does not move forward, that release will not become effective.

Generally, the more subdivisions that participate, the greater amount of the settlement funds will flow to California and its participating local jurisdictions. Local government support and sign-on is required to maximize the amount coming to local communities. Eligible cities may elect to receive direct payment or have their allocated share go to the county in which they are located. According to the settlement administrator, 99% of cities and counties (by population) have joined the recent settlements against other opioid defendants. Indeed, the City participated in the 2023 national opioid litigation settlement agreement with CVS, Walgreens, Walmart, Teva and Allergan, as well as the 2021 agreements with various pharmaceutical Distributors and manufacturer Johnson & Johnson. As in those agreements, any subdivision that does not participate cannot directly share in any of the settlement funds. Any subdivision that does not participate may also reduce the amount of money for programs to remediate the opioid crisis in the state.

If the City elects to participate, the City can later decide whether to receive its share of allocated funds under the settlement agreements directly or have its share of funds default to San Luis Obispo County. For the two previous opioid settlement agreements, the City has elected to defer its funds to the County, based on the assessment that the administrative and reporting burden² outweighed the benefit of a direct allocation. However, the annual aggregate amount for which the City is eligible, either now or in the future as additional settlements are reached, may justify a direct allocation.³

² Participating Subdivisions receiving funds from the California opioid settlements are required to complete annual reporting of funds received and expended, by activity, to the Department of Health Care Services (DHCS.)

³ The City's 2024 opioid settlement shares were \$47,757.32 from the 2021 "Distributor" settlement (payment year 4 of 18 years), and \$41,744.24 from the 2021 Janssen settlement (payment year 3 of 10 years), both of which were redirected to the County. Payments from the 2023 settlements have not yet been disbursed.

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A direct allocation would require the City to administer the funds and report annually on program expenditures but would also allow the City greater control over how the funds are used. All payments due by defendants under the existing settlement agreements are to be paid out over a period of several years, ranging from six years (Walmart) to 18 years (Distributors).

The decision on disposition of funds for the Kroger settlement agreement does not need to be made now. The only decision the City must make now is whether to participate in the settlement agreement. Opting to participate in the settlement means agreeing to the terms of the settlement agreement, releasing all claims within the scope of the settlement, and agreeing to use monies received as required under each settlement. Staff recommends that Council delegate to the City Manager and City Attorney the authority to make this election (which can be changed later for any disbursement, at least 60 days prior to a Payment Date).

If the City does not opt in by August 12, 2024, it will be precluded from participation in the agreement, will not receive any of the allocated settlement funds and will be left with the option to individually pursue litigation against Kroger Co. (note that the City's participation in the settlement will include executing a Master Dismissal of released claims against these defendants). The latter option would be burdensome, costly, risky and demanding of resources vastly disproportionate to the City's likely ability to prevail in individual litigation against the various defendants. Accordingly, staff is recommending the City Council authorize participation in the existing settlement.

Previous Council or Advisory Body Action

Council approved participation in the national opioid litigation settlement agreements with McKesson, Cardinal Health, and AmerisourceBergen ("Distributors") and Janssen/Johnson & Johnson in [2021](#). Council also approved participation in the settlement agreement with CVS, Walgreens, and Walmart pharmacies as well as the Teva and Allergen manufacturers in [2023](#).

Public Engagement

None. Not applicable since this involves a settlement of litigation to which the City was not a direct party.

CONCURRENCE

The Police and Fire Chief, Community Development and City Administration Departments concur in the recommendation.

ENVIRONMENTAL REVIEW

The California Environmental Quality Act does not apply to the recommended action in this report, because the action does not constitute a "Project" under CEQA Guidelines Section 15378.

FISCAL IMPACT

Budgeted: No

Budget Years: 2024 through 2034

Funding Identified: N/A. Settlement agreement would provide funds to the City, not require funds be paid out.

Fiscal Analysis:

Funding Sources	Total Budget Available	Current Funding Request	Remaining Balance	Annual Ongoing Cost
General Fund	\$	\$0	\$	\$0
State				
Federal				
Fees				
Other:				
Total		\$0		\$0

The amount of funds that would be received by the City under the settlement agreements cannot be estimated at this time. The final pay-out amounts will be determined by the percentage of local jurisdictions that elect to participate in the agreements. The funds will be received annually over a period of 11 years after the agreement’s effective date.

ALTERNATIVES

Do not approve the City's participation in the settlement agreements and preserve the City's option to pursue litigation against the pharmaceutical distributors and manufacturer without receiving any funds from the settlement agreements. Staff does not recommend this option for reasons set forth above.

ATTACHMENTS

A - Subdivision Participation and Release Form